Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BENJAMIN BONITO, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

Whether 18 U.S.C. §666 is applicable to the payment of a bribe or gratuity to an agent of a local organization when the bribe or gratuity cannot influence that agent's acts relating to the financial or proprietary interest of that organization.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	v
Opinion Below	1
Jurisdiction	2
Statutory Provision Involved	2
The Indictment	3
Statement of Facts	3
Reasons for Granting the Petition	5
A. Section 666 Was Intended To Apply Solely to a Bribe or Gratuity Paid to an Agent of a Local Organization Receiving Federal Funds When the Bribe or Gratuity Could Affect the Finances or Proprietary Interests of that Organization	
1. Introduction	5
2. Legislative History	6
3. Lenity	8
4. Federalism	8
Conclusion	10
Appendix (Opinion of the Second Circuit)	A-1

TABLE OF AUTHORITIES

Cases	**Page**
Dowling v. United States, 473 U.S. 207 (1985)	10
Rewis v. United States, 401 U.S. 808 (1971)	8
United States v. Bass, 404 U.S. 336 (1971)	8
United States v. Cicco, 938 F.2d 441 (3d Cir. 1991)	5, 8
United States v. Del Toro, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975)	7
United States v. Enmons, 410 U.S. 396 (1973)	8
United States v. Hinton, 683 F.2d 195 (7th Cir. 1982, *aff'd sub nom.*, *Dixson v. United States*, 465 U.S. 482 (1984)	7
United States v. Mosley, 659 F.2d 812 (7th Cir. 1981)	7
United States v. Wyncoop, 11 F.3d 119 (9th Cir. 1993)	5
Statutes and Rules	
Conn. Penal Code §§53a-146(3) and 147(a)	8, 9
18 U.S.C. §371	2
U.S.C. §666	*passim*
S. Rep. No. 225, 98th Cong., 2d Sess., 1984 U.S. Code Cong. & Admin. News 3182	6

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Benjamin Bonito, Jr. ("Bonito") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Second Circuit, officially reported at 57 F.3d 167, is set forth in the Appendix annexed hereto.

JURISDICTION

The Second Circuit entered its judgment on July 9, 1995. A timely petition for rehearing was denied on September 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The pertinent provisions of 18 U.S.C. §666, under which Bonito was convicted,[1] read as follows:

> §666. Theft or bribery concerning programs receiving federal funds.
>
> (a) Whoever, if the circumstance described in subsection (b) of this section exists ---
>
> * * *
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a ... local ... government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more,
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in

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[1] Bonito was also convicted, with his co-defendant Joseph DeMatteo, of violating 18 U.S.C. §371 for conspiring to violate Section 666. DeMatteo, involved neither in the appeal to the Second Circuit nor in this petition, was also convicted under 18 U.S.C. §666(a)(1)(B) --- the mirror-image of subdivision(a)(2). Bonito was the alleged offerer of the bribe, DeMatteo its alleged recipient.

excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

* * *

(d) As used in this section ---

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or the legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program; ...

THE INDICTMENT

The count charging Bonito with a substantive violation of 18 U.S.C. §666 read, in pertinent part, as follows:

From October 1990 through June 1992 ... BONITO ... did knowingly and corruptly give, offer and agree to give a thing of value ... to ... DeMatteo, ... with intent to influence or reward DeMatteo, an agent of local government, that is, the City of New Haven, in connection with the business, a transaction and a series of transactions of said government involving a thing of value of $5,000 and more.

STATEMENT OF FACTS

The relevant facts of this case are these:

Bonito is a landlord and real estate developer in the New Haven area. He was indicted for giving a car bribe or gratuity to his co-defendant and long-time friend Joseph DeMatteo, who was the Director of Real Estate Services for the City of New Haven.

The New Haven Housing Authority ("NHHA") is an organization created by Connecticut statute[2] which administers housing projects funded by the United States Department of Housing and Urban Development (HUD), and operates under close HUD supervision. The NHHA exists independently of the local government of New Haven.

In 1989, the NHHA decided to abandon a high-rise project and to relocate its mainly black residents to single-family units throughout New Haven in racially-mixed neighborhoods. The plan sparked controversy in New Haven and, in 1990, the NHHA agreed to cooperate with New Haven by joining with it in the creation of a committee (some of whose members would be appointed by New Haven's mayor) which would identify suitable sites for the relocation efforts. The mayor appointed DeMatteo as one of his representatives on that special committee.[3]

In October of 1990, Bonito bought a car for $9,500, but never picked it up from the lot. Instead, three months later, DeMatteo paid the tax and registration fee on the car and took possession of it. Thereafter, in various ways, DeMatteo advanced Bonito's interests in either selling a housing project he owned to the NHHA for approximately $1,000,000 (an unsuccessful effort) or placing dislocated tenants in Bonito's housing units. The monies which would have been involved if the sale had been accomplished were federal funds from

---

[2] See Conn. Gen. Stat. §8-40.

[3] The fact that the NHHA administered federal funds is immaterial and played no part in the Government's theory of its case. DeMatteo was not an agent of the NHHA. If he supported NHHA's desire to buy Bonito's housing, he acted in favor of (rather than in conflict with) the interests of the NHHA.

HUD, administered by the NHHA. No money from the City of New Haven was implicated in these transactions, although it was conceded at trial that New Haven received more than $10,000 per year in federal funds.

On these facts, both Bonito and DeMatteo were convicted of violating section 666 and of conspiring to do so. On appeal, Bonito claimed that since the purpose of section 666 is to protect the integrity of federally-financed projects, the only bribe or gratuity criminalized by it is that intended to influence an agent of a federally-financed organization in decisions relating to the financial or proprietary interests of the organization of which the bribee is an agent. The Second Circuit, however, accepted the Government's claim that section 666 makes it a federal crime to bribe or pay a gratuity to any agent of any organization receiving $10,000 or more in federal funds per year, even if the bribe or gratuity had no connection whatever to any financial or proprietary interest of that organization. Thus, while it was necessary under the statute to prove that the City of New Haven annually received $10,000 or more in federal financing, it was not otherwise necessary to establish that the financial interests of New Haven (and, very indirectly, of the United States) were harmed or threatened by the bribe or gratuity.

REASONS FOR GRANTING THE PETITION

A. Section 666 Was Intended To Apply Solely to a Bribe or Gratuity Paid to an Agent of a Local Organization Receiving Federal Funds When the Bribe or Gratuity Could Affect the Finances or Proprietary Interests of that Organization

1. Introduction

We bring to this Court yet another instance of a governmental effort --- sometimes rebuffed by the courts below[4] but

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[4] See, e.g.: *United States v. Wyncoop*, 11 F.3d 119 (9th Cir. 1993); *United States. v. Cicco*, 938 F.2d 441 (3d Cir. 1991).

here thus far successful --- to extend the scope of 18 U.S.C. §666 beyond that which Congress intended it to have, thus violating principles of both lenity and federalism.

2. Legislative History

The legislative history of section 666 shows that it was never intended to apply to cases such as this, where the bribe or gratuity never affected or threatened the finances or proprietary interest of the federally-funded local organization of which the recipient was an agent.

The purpose of this section is set forth in S. Rep. No. 225 at 269, 98th Cong. 2d Sess., reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3510. That report, in pertinent part, reads as follows:

> 1. *In general*
>
> This ... [statute] is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program. ...
>
> 2. *Present Federal law*
>
> * * *
>
> With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to Federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the Federal Government may be considered as a "public official" under the definition in 18 U.S.C. 201(a) as anyone "acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function." The courts of appeals have divided on the question whether a person employed by a private organization receiving Federal monies

> pursuant to a program is a "public official" for purposes of section 201. ...
>
> 3. *Provisions of the bill, as reported*
>
> ... [T]he purpose of this section [is] to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.

After explaining various provisions of the new statute and warning that it was not meant to apply to thefts or briberies concerning every disbursement of federal funds, the Report stated that:

> It is, however, the intent to reach thefts and bribery in situations of the types involved in the *Del Toro*, *Hinton*, and *Mosley* cases cited herein.

The cases cited were: *United States v. Del Toro*, 513 F.2d 656 (2d Cir.), *cert. denied*, 423 U.S. 826 (1975); *United States v. Hinton*, 683 F.2d 195 (7th Cir. 1982), *aff'd sub nom.*, *Dixson v. United States*, 465 U.S. 482 (1984); and *United States v. Mosley*, 659 F.2d 812 (7th Cir. 1981).

In each of the three cases, the defendant (who, Congress thought should be convicted, and *would* be, under the new statute) was an agent of the organization administering federal funds and received a bribe in connection with the business of that very same organization.

Here, in stark contrast, the bribee-agent of a local government receiving federal funds did nothing to affect or threaten the finances of that local government. The ambit of section 666, as construed by the Second Circuit, is thus limitless and bears little relationship to the mischief against which it was aimed. In the absence of the restrictions which Congress clearly intended by stating that section 666 applied to the improper influence of an agent of an organization concerning the business and transactions "of such organization," that section may be improperly expanded to cover a legion of purely local wrongdoing.

3. Lenity

The scope of section 666 has been declared "ambiguous."[5] Indeed, the Second Circuit acknowledged (A-9) the "force" of Bonito's argument that the section was not intended by Congress to cover the facts of this case. It nonetheless ignored the ambiguity.

Ignored, as well, was the doctrine of lenity. In *United States v. Enmons*, 410 U.S. 396, 411 (1971), for example, this Court stated:

> ...[T]his being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity.

See also *Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity").

The Second Circuit sought to give a definite meaning to ambiguous words. It stated (A-9) that the actual wording of the statute "arguably allows for a more expansive reading" than that given it by Bonito, and then proceeded to give the statute a "more expansive" reading by defining "broadly" the word "business." Thus, the statute was held applicable to Bonito's conduct even though the bribe-receiver's conduct did not implicate or threaten the federal funds (granted to New Haven) which the statute was intended to protect.

4. Federalism

Related to the issue of lenity is that of federalism. The conduct for which Bonito was convicted in a federal court is not left unpunishable under state law, but is branded a felony. See Conn. Penal Code §53a-147(a).[6] In *United States v. Bass*, 404 U.S. 336, 349 (1973), this Court stated that:

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[5] See, e.g., *United States v. Cicco*, *supra* note 4 at 444.

[6] That section reads in pertinent part as follows:

(Footnote continued)

> ...[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. ... [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction. (Footnotes omitted.)

Concepts of federalism can hardly be said to have been respected when an "ambiguous" statute is "broadly" interpreted so as to "arguably" cover a defendant's conduct. The scope of the section may fairly be said to include only what Congress clearly intended it to include, and no more.

"A person is guilty of bribery if he promises, offers, confers or agrees to confer upon a public servant ... any benefit as consideration for the recipient's decision, opinion, recommendation or vote as a public servant. Section 53a-146(3) defines "public servant" as "an officer or employee of government, elected or appointed, and any person participating as adviser, consulting or otherwise, paid or unpaid, in performing a governmental function."

DeMatteo was clearly a "public servant."

CONCLUSION

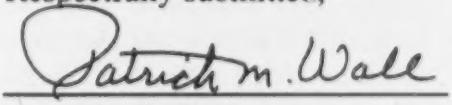
In *Dowling v. United States*, 473 U.S. 207, 213 (1985), this Court stated that:

> [W]hen assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids.

Here, section 666's language, legislative history and purpose, as well as long-respected principles of lenity and federalism all point to the conclusion that Bonito's conduct, however wrong it may have been under Connecticut's statutes, violated no federal criminal law.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,



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November 30, 1995

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1125 —August Term 1994

Argued: February 24, 1995 Decided: June 8, 1995

Docket No. 94-1273

UNITED STATES OF AMERICA,

Appellee,

—v.—

BENJAMIN BONITO, JR.,

Defendant-Appellant.

Before:

NEWMAN, *Chief Judge,*
VAN GRAAFEILAND and COFFIN,* *Circuit Judges.*

Appeal from the judgment of conviction for violating 18 U.S.C. § 666 and conspiracy to violate 18 U.S.C. § 666 entered on December 14, 1993 after jury trial before the Honorable Alan H. Nevas in United States District Court for the District of Connecticut, and the sentence imposed.

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* The Honorable Frank M. Coffin of the United States Court of Appeals for the First Circuit, sitting by designation.

Affirmed.

STEVEN DUKE, New Haven, Conn., (Robert (Casale, Branford, Conn., Ashlie Berenger, Shawn Chen, Allegra Lawrence, Richard St. John and Grant Vinik, New Haven, Conn., on brief), *for appellant Bonito.*

JOSEPH C. HUTCHINSON, Asst. U.S. Atty., New Haven, Conn. (Christopher F. Droney, U.S. Atty., New Haven, Conn., on the brief) *for appellee.*

COFFIN, *Senior Circuit Judge.*

Benjamin Bonito was convicted of violating 18 U.S.C. § 666,[1] which proscribes bribery of officials of public and private entities receiving federal funds, and con-

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[1] The particular provision was § 666(a)(2), which states:

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 . . . .

18 U.S.C. § 666.

spiracy to violate § 666. He was indicted for giving an automobile to a city of New Haven real estate official to influence the purchase of his "Bonito Village" by the state-created New Haven Housing Authority, and also to steer New Haven tenants to his properties. He challenges the jury instructions, the sufficiency of the evidence, and his sentencing. We affirm.

I. *Background*

Benjamin Bonito was a landlord and real estate developer in the New Haven area. He was charged in the indictment with giving a car bribe to his co-defendant at trial, Joseph DeMatteo, who was the Director of Real Estate Services for the City of New Haven and also a member of a joint New Haven-New Haven Housing Authority committee established to select sites for low income housing. The New Haven Housing Authority is an organization created by Connecticut statute, *see* Conn. Gen. Stat. § 8-40, which administers projects funded by the federal Department of Housing and Urban Development (HUD), and operates under close HUD supervision. It exists independently of the City of New Haven, which is a municipality of the state of Connecticut.

Bonito purchased a 1991 Mercury Tracer at a fundraising auction in October 1990 for $9,500. He paid for the car, but never picked it up from the lot. Instead, three months later, DeMatteo, who had originally obtained the car from a local Budget Rent-a-Car for the auction organizing committee, paid the tax and registration fee on the vehicle and took possession of it. Budget transferred the title directly to DeMatteo, though no Budget employee could remember receiving authorization from Bonito to

do so. Bonito later told the police that he had bought the car at DeMatteo's request.

On January 25, 1991, DeMatteo executed a document captioned "Promissory Note." According to Bonito's statement to the police, the Note guaranteed repayment for the car. On its face, the Note described a repayment schedule for an interest free loan from Bonito in the amount of $8,200, with no mention of the car or description of the consideration given. DeMatteo was to pay monthly installments of $300 for one year starting on February 15, 1991, with the balance due in February 1992. Any default made the entire balance payable immediately and triggered a 10% interest rate. DeMatteo never made any payments on the Note. Nonetheless, Bonito did not bring suit to collect until June 30, 1992, when a corruption investigation was well under way.

The car allegedly was given primarily in connection with Bonito's attempted sale of Bonito Village to the Housing Authority. The government introduced evidence showing that Bonito had tried unsuccessfully to sell the property on the open market, and had tried but failed to sell the property to the Housing Authority in 1989. In 1990, DeMatteo was appointed to represent New Haven on a joint New Haven-Housing Authority committee established by the mayor to identify and approve sites for a few hundred units of low income housing to be purchased by the Housing Authority. The relationship between the two entities was one of cooperation; while final legal authority to choose sites may have remained with the Housing Authority, the mayor had issued a directive saying that his approval was required. During the months following the car transfer, DeMatteo allegedly used his position on the committee to advance the Housing Authority's purchase of Bonito Village in a

number of ways: he set up meetings between Bonito and an aide to the Mayor concerning the deal; he became involved in the negotiations over price; and he contacted both New Haven and Housing Authority officials involved in the decision making process to try to push the deal through. Government evidence showed that DeMatteo frequently met with Bonito throughout this period of advocacy, during which DeMatteo's installment payments on the Note were falling due, and going unpaid. On April 4, 1991, the Housing Authority submitted a proposal to HUD to purchase Bonito Village for over $1.1 million. HUD rejected the deal, citing excessive price, the presence of hazardous conditions on the property, and problems with maintaining the property's one accessible road.

The government's secondary theory was that, once the Bonito Village deal fell through, DeMatteo found an alternate means to benefit Bonito. DeMatteo served as the administrator of a federal program by which occupants of condemned buildings were given temporary housing pending permanent relocation. Two months after HUD rejected the purchase of Bonito Village, DeMatteo directed his assistant to place two such displaced tenants in Bonito-owned properties and authorized payment of $12,800 to Bonito. The government argued that several facts surrounding these placements support the inference that they were connected to the car bribe. First, Bonito's buildings had never before been used. Second, the daily rate asked by Bonito and approved by DeMatteo resulted in a payment of $2,150 on September 21, 1991, six days after DeMatteo had failed to pay $2,400 on the Note for the car. Finally, New Haven had a policy of securing permanent replacement housing as quickly as possible, but the two tenants remained in Bonito's "temporary" hous-

ing for four and five months, respectively, at which time they were converted into "permanent" residents and their rents decreased.

II. *Discussion*

Bonito challenges his conviction and sentence on several grounds. We address them seriatim.

A. *The Jury Charge*

Bonito argues that the instructions were faulty in three basic respects. We note that he failed to lodge any objection to the instructions below, so we review for plain error only. Fed. R. Crim. P. 52(b); *United States* v. *Aulicino*, 44 F.3d 1102, 1109 (2d Cir. 1995). A defendant satisfies this standard by showing that there was error, that it was clear or obvious, and that it affected a substantial right. *United States* v. *Olano*, 113 S. Ct. 1770, 1776-78 (1993); *United States* v. *Viola*, 35 F.3d 37, 41 (2d Cir. 1994). None of his assigned errors meets this stringent test.

1. The Gratuity Claim

Bonito's first claim is that § 666 applies only to bribery, and not gratuities. He argues that the court's instructions erroneously told the jury to convict if he corruptly gave DeMatteo a thing of value in connection with any business "past, present or future," and incorrectly defined the word "corrupt." These errors, he maintains, allowed conviction without requiring the jury to find the requisite mens rea for bribery.

In *United States* v. *Crozier*, 987 F.2d 893, 898-99 (2d Cir. 1993), we held that the former version of § 666

applied to both illegal gratuities and bribes. Bonito argues that the new version does not because it no longer contains the language upon which the *Crozier* court relied for its holding. Fatal to his argument, however, is the fact that the deleted language has been replaced with language that is to the same effect. *Compare id.* at 899 (under the former version of § 666, the payment must be "for or because of" the official conduct) *with* § 666(a)(1)(B) (under the current version, the payment must be "to influence or reward" the official conduct). Thus, the current statute continues to cover payments made with intent to reward past official conduct, so long as the intent to reward is corrupt.

Bonito also argues that the term "corrupt" was inadequately explained to the jury. We disagree. The court specifically instructed that the government had to prove that Bonito acted with corrupt intent, which it defined as acting

> voluntarily and intentionally and with the purpose, at least in part, of accomplishing either an unlawful end result or a lawful end result by some unlawful method or means. A person acts corruptly, for example, when he gives or offers to give something of value intending to influence or reward a government agent in connection with his official duties.

Because it told the jury that the bribe had to be made "with the purpose . . . of accomplishing . . . an . . . end," this instruction made clear that the corrupt agreement, offer or payment must precede the official act to be influenced or rewarded. It then accurately tracked the statutory language as an example. No more was required. *Cf. United States* v. *Medley*, 913 F.2d 1248, 1261 (7th Cir. 1990) (failure to use the word "corrupt" not plain

error where jury was told that defendant must have accepted or agreed to accept payment intending to be influenced or rewarded in his official conduct).

2. The Relevant Governmental Unit

Bonito makes a two-pronged argument that his conviction was based on an impermissible reading of § 666(a)(2). The first, initially raised as part of his Rule 29 motion for judgment of acquittal, is that any bribery of DeMatteo for trying to advance the purchase of Bonito Village by the Housing Authority could not have been in connection with the "business, transaction or series of transactions" of New Haven involving at least $5,000, because no New Haven funds were implicated by the Bonito Village deal. The second is that the jury was erroneously instructed to convict if it found that DeMatteo was influenced or rewarded in connection with "*any* local government business or transaction" (emphasis added), since this would allow the jury to convict if it found that the bribe was given in connection with Housing Authority business, i.e., its hoped for purchase of Bonito Village. Bonito concedes that he lodged no objection to the instructions, but urges that the failure to specify that the bribe had to be given in connection with *New Haven* business, as was alleged, worked a constructive amendment of the indictment, a *per se* Fifth Amendment violation.

The government, in response, argues that the Housing Authority's potential purchase of Bonito Village was the business of *both* New Haven and the Housing Authority, so there was no error at all if the jury found that the bribe was intended to influence DeMatteo in connection with the Bonito Village deal, and that the instructions as

a whole made clear that the bribe had to be in connection with New Haven business.

In regard to his first argument, Bonito vigorously contends that if the phrase, "business or transaction of the organization involving at least $5,000," is read so that the organization need not have a financial interest in the corrupted business or transaction, the statute no longer serves its intended purpose of " 'protect[ing] the integrity of the vast sums of money distributed through federal programs.' " *United States* v. *Coyne*, 4 F.3d 100, 109 (2d Cir. 1993) (quoting S. Rep. No. 225, 98th Cong., 2d Sess. 369-70 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510-11). In other words, he argues, the affected organization (New Haven), although meeting the jurisdictional requirement of having received at least $10,000 of federal monies within one year of the offense, did not have at least $5,000 at stake in the corrupted business or transaction. Thus, he maintains, there is no connection between the corrupted business or transaction and the protection of federal funds. Without such a link, § 666 would be an instrument that could reach any substantial corruption within a state or local government whether or not there were any " 'significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State or local governments pursuant to a federal program,' " *id.*, Congress's target in passing § 666.

We acknowledge the force of this argument. On the other hand, there are a number of factors in favor of construing § 666 to cover corruption of agents of a federally funded organization even in those official activities that do not implicate their organization's own funds. First, the actual wording of the statute arguably allows room for a more expansive reading. "Business," broadly

defined, includes "work," "professional dealings," "one's proper concern," and "serious work or endeavor that pertains to one's job." American Heritage Dictionary 180 (1973). Also, at least on its face, the statute does not say that the thing of value of $5,000 must be that of the affected organization. It says only that the corruption must be in connection with the organization's business or transaction "involving" a thing of value of $5,000 or more. In addition, we have already extended the statute beyond corruption in a local organization's administration of a federally funded program. *United States* v. *Coyne*, 4 F.3d at 110. The rationale for this was stated most succinctly by the Fifth Circuit: "It is sufficient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organization that receives them." *United States* v. *Westmoreland*, 841 F.2d 572, 578 (5th Cir. 1988). Yet, if the organization has no financial stake whatsoever in the corrupted business, how far, if at all, should § 666 reach beyond the organization whose integrity is sought to be protected to satisfy the requirement that more than $5,000 be involved?

We shall not attempt to chart the outermost bounds of § 666 here. It is sufficient to say that we consider "business" as something different from, and often broader than, "transaction." For present purposes, we would define it to include the dealings of a government official in connection with a discrete transaction. This complements the sense of "transact" and "transaction," which imply a concluded business agreement. American Heritage Dictionary 1362 (1973).

In the case at bar, the mayor of New Haven had directed that no site be accepted by the Housing Authority for the placement of low income housing without his

prior approval. He placed DeMatteo, as his agent, on the joint New Haven-Housing Authority committee to represent New Haven's interests in site selection. Whether the Housing Authority had sole legal authority for site selection, it had decided to cooperate with the City, and, in fact, the only site it approved and sent to HUD for its consideration was endorsed by DeMatteo in his capacity as the City's representative. This enterprise—deciding on the location of scattered site housing—was being conducted in close cooperation between the City and the Housing Authority. It was, at all times relevant to this case, the business of both. Further, we cannot ignore that this joint enterprise was one that would determine the disposition of federal grant monies. If the corruption of an organization's official in the administration of non-federal monies can trigger § 666 because of the indirect infection of the federal monies that organization receives, so, it seems to us, should the corruption of an official as he plays a significant, if not dominant, role in the improper disposition of federal monies by another organization. Thus, in this case, the fact that no New Haven funds were implicated by DeMatteo's corrupt activities does not place Bonito's conduct outside the scope of § 666. This conclusion does no violence to the actual words of the statute, and, based on the unusual fact that federal funds were sought to be corrupted through the Housing Authority, serves the statute's underlying purpose. It would be quite another case if the corrupted business affected neither the financial interests of the protected organization nor, as in this case through the Housing Authority, federal funds directly.

Bonito's second argument is that the charge did not require the jury to make a fact finding on the essential element that the bribe was made in connection with New

Haven business. Since the jurors were told the bribe had to be in connection the business "of *any* local government," they may have simply found a link to the business of the Housing Authority, rather than the City of New Haven, as was charged in the indictment. Such a finding, Bonito concludes, would have worked a constructive amendment of the indictment.

It is axiomatic that specific claimed errors in a jury charge must be scrutinized in the context of the charge as a whole. *E.g.*, *United States* v. *Coyne*, 4 F.3d at 113. Our review of the whole charge leaves us skeptical, at best, that the jury would not have understood that the bribe had to be in connection with New Haven's business. At three separate points, the court's instructions strongly implied the required connection between the bribe and New Haven business. First, in providing an overview of the elements, the court stated that the third element required proof that Bonito "intended to influence or reward the local government agent in connection with any business . . . of the local government." Since it was not contested that DeMatteo was an agent of New Haven, this phrase necessarily meant that the bribe had to be made in connection with New Haven business. The same logic applies to the court's instruction that the second element of the crime would be satisfied if "DeMatteo was an agent of a local government and . . . Bonito gave . . . him something of value, at least in part with the intent of influencing or rewarding [him] in connection with his official duties." This phrase could only have meant that the bribe must have been in connection with Bonito's official duties as an agent of New Haven.

Finally, immediately after using the phrase that Bonito assigns as error, the court continued in a fashion that

again reinforced that the bribe had to have been made in connection to New Haven's business:

> The third element that the government must prove beyond a reasonable doubt is that the defendant Bonito intended to influence or reward Joseph DeMatteo in connection with any local *government* business or transaction involving anything of value of $5,000 or more. If you find that the *government* business or transaction in question had a value of at least $5,000, then [this element is satisfied]. However, if you determine that the value of the *government* business or transaction was less than $5,000, you must find the defendant not guilty of the offense.
>
> The fourth element . . . is that the City of New Haven received in any one year period federal benefits in excess of $10,000 . . . .

(emphasis added.) Since the same government whose business had to involve at least $5,000 also had to receive in excess of $10,000 in federal funds, and since New Haven was expressly named as the government that had to receive the requisite federal funds, this part of the instruction also indicated that the bribe had to be in connection with New Haven business.

Thus, while the instruction would have been more precise if it identified New Haven individually, the failure to do so did not inevitably led the jury to focus exclusively on the business of the Housing Authority. At trial, had objection been lodged to the imprecision, the judge would have been well advised to correct it. But on appeal, and in light of the charge as a whole, we see no error so obvious and seriously prejudicial to Bonito's substantial rights as to constitute plain error.

B. *Sufficiency*

Bonito also challenges the sufficiency of the evidence to support his conviction. In assessing this claim, we view the evidence and the inferences it raises in the government's favor. *E.g.*, *United States* v. *Scarpa*, 913 F.2d 993, 1003 (2d Cir. 1990). Seen in this light, there was sufficient evidence upon which a rational jury could have found each of the required elements of the crime to have been proven beyond a reasonable doubt.

The government had to prove that Bonito (1) gave DeMatteo a thing of value (2) with corrupt intent to influence or reward an agent of a federally funded organization, in this case New Haven, (3) in connection with New Haven business or transactions (4) involving anything of value of $5,000 or more.

The first element is easily satisfied. Bonito gave DeMatteo a new Mercury Tracer for which he paid $9,500, and, even if we are to take the "Promissory Note" at face value, he only required $8,200, to be paid back over the course of one year, in return. The second element, that the bribe was given with corrupt intent to influence or reward an agent of New Haven, is also adequately supported.[2] There was no evidence that DeMatteo ever made any of the required payments under the Note, and Bonito took no action to collect until after a corruption investigation was made public. Thus the jury could have concluded that the Note itself was a sham designed to insulate the car bribe from discovery. Instead of paying back Bonito for the car, DeMatteo undertook a range of activities that inhered to Bonito's financial benefit. These included steering the two temporarily dis-

[2] It is not contested that New Haven received the requisite federal funds. There is also no question that DeMatteo was a New Haven agent.

placed tenants to Bonito-owned properties and authorizing payment of $12,800 to him, and exercising his authority as a New Haven representative on the joint New Haven-Housing Authority committee to support the purchase of Bonito Village. While the defendant offers innocent explanations for these events, there was enough evidence to allow the jury to find that the two had corruptly agreed that Bonito would give the car bribe in exchange for these favors. On the third element, as discussed above, DeMatteo's efforts on Bonito's behalf were taken in his capacity as a representative of New Haven. Based on this conduct, it was rational for the jury to find that the bribe was given in connection with New Haven business. Since the Bonito Village deal was set for over $1.1 million, the jury also reasonably concluded that more than $5,000 was involved.

C. *Sentence*

Bonito's sentencing proceedings were somewhat unusual, and we set them out in detail.

Sentencing proceedings commenced on April 4, 1994. It was undisputed that Bonito's criminal history category was I and his offense level was 14, resulting in a guideline range from 15 to 21 months. Based on letters from Bonito's physicians, however, the court determined that he suffered serious impairments from cancer, diabetes, hypertension, and gout, and it departed downward on that ground:

> Therefore, it is the sentence of this court—first the court will depart downward from offense level 14 to offense level ten based upon your serious medical condition . . . . And it is the sentence of this court that you be committed to the custody of the Bureau of Prisons for a period of six months, with a rec-

> ommendation that your placement be in a medical facility. The sentence is on count one of six months.
>
> Sentence on count three is six months to run concurrent with the sentence imposed on count one.
>
> You are to be placed on supervised release for a period of three years following your release from incarceration.
>
> Special assessment of $50 on each count for a total of $100 is imposed. . . .

Immediately thereafter, the prosecutor noted that the court had failed to impose a fine, which, based on an offense level of 10, should have been between $2,000 and $20,000. U.S.S.G. § 5E1.2(c)(3). This was entirely appropriate: since the fine was mandated by the Guidelines, the district judge was required to give an explanation before waiving its imposition. 18 U.S.C. § 3553(c)(2).

After the prosecutor objected, the court did explain why it had not imposed a fine: Bonito had submitted a financial statement attesting to his inability to pay. The prosecutor immediately stated that he had not received the financial statement for review. Upon briefly examining it, he stated that he had information indicating that Bonito could indeed pay a fine, specifically that Bonito had filed a complaint with a local police department alleging that $70,000 in cash had been stolen from the trunk of his car, and that there had been monthly transfers of up to $100,000 in Bonito's Florida bank accounts. Thereafter the prosecutor suggested that the proceedings be adjourned to allow a more complete investigation of Bonito's financial status and whether his financial statement was false. The court stated that "[i]f a false state-

ment had been submitted to the court with a view toward influencing the court's decision with respect to the sentence or whether or not a fine is in order, that would be very relevant" to sentencing.

The court then stated its inclination to impose a fine of $20,000, but it was clear that whether or not a fine was to be imposed remained open:

> All right, this is what the court will do. In addition to the penalties already imposed with respect to count one, the court will impose a fine of $20,000, which is . . . the top of the guideline range, and if [defense counsel] wants to present evidence . . . that his client is unable to pay that fine, the court will entertain that submission, and of course the government will have an opportunity to respond.

The prosecutor suggested that, instead of proceeding in this manner, it would be preferable not to impose any sentence and adjourn the proceedings to allow the court to first consider further submissions. The court agreed, and the matter was continued until April 28, 1994.

Each party filed supplemental materials concerning Bonito's financial status before the next proceeding. The government's submission showed that, between August 1993 and February 1994, over $400,000 in cash had been transferred through Bonito's Florida bank accounts. These transfers had occurred at a time when the Federal Deposit Insurance Corporation and the Branford Savings Bank had made demands for payment of outstanding loans of $2.5 million and $1.5 million, respectively. Bonito, for his part, submitted numerous betting slips showing gambling losses of $330,000 in 1993-1994.

At the second proceeding, Bonito argued that the betting slips proved the accuracy of his financial statement

that he could not pay a fine. The government, shifting gears, did not press the issue of the applicability of a fine. Instead, it argued that the betting slips showed that Bonito was well enough to travel extensively to gamble, in addition to managing his numerous rental properties and other real estate activities in New Haven. The government concluded that the downward departure for ill-health, which the court had found appropriate at the first proceeding, should not be granted.

The court ultimately agreed with the government. It imposed no fine, but neither did it depart based on Bonito's medical condition. On counts one and three it imposed concurrent sentences of fifteen months' incarceration and three years' supervised release, recommending to the Bureau of Prisons that Bonito be housed at an institution that could accommodate his medical needs.

On appeal, Bonito claims that the district court was without power to alter the terms of the sentence it originally had "imposed" on April 4. In relevant part, 18 U.S.C. § 3582(c) provides that: "The court may not modify a term of imprisonment *once it has been imposed* except . . . [if] expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure" (emphasis added). Rule 35 allows modification only after remand from a court of appeals, a change in circumstances caused by defendant's substantial assistance to the government, or if the sentence was based on arithmetic, technical or other clear error. Fed. R. Crim. P. 35. No other statute is relevant.

Defendant urges that his sentence was imposed the moment the judge concluded his initial articulation of sentence, citing *United States* v. *Marquez*, 506 F.2d 620.

622 (2d Cir. 1974). But, as we made clear in *United States* v. *Carbone*, 739 F.2d 45, 47 (2d Cir. 1984), *Marquez* stands for the limited proposition that where an "unambiguous oral sentence pronounced by the court conflict[s] with the written judgment and commitment, the oral pronouncement controls." We also made the more general observation that "[a]t sentencing proceedings[,] discussion subsequent to an initial ruling may result in the court's modifying its initial pronouncement, all before its ruling becomes 'final.' " *Id.* While a somewhat different legal question was involved in that case, we find this reasoning animates our interpretation of § 3582(c)'s use of the term "imposed." As indicated above, within a single, uninterrupted proceeding, at which the defendant was at all times present, the initial sentence was articulated based on a financial statement filed by the defendant that the prosecutor had not received for review, the prosecutor immediately indicated that he had contrary information, which, the court stated, would be quite relevant to its determination of sentence if true, and the court adjourned the sentencing proceeding. We see no reason for interpreting § 3582(c)'s use of "imposed" with undue rigidity, so as to lock a judge into an articulation of sentence based on misinformation, or one sided information, under these circumstances.

Since sentence was never imposed on April 4, neither Rule 35 nor § 3582(c) are implicated. The sentence ultimately imposed was within the applicable guideline, and we leave it undisturbed.

The judgment of conviction and the sentence are affirmed.